Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

B&W INVESTMENT PROPERTIES and LOUIS WOLF,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether or not the Environmental Protection Agency, in the case where asbestos is the pollutant, must give notice, pursuant to Section 113(a)(1) of the Clean Air Act [42 U.S.C. sec. 7413(a)(1); as in effect prior to November 15, 1990], to a violator as a precondition to filing an enforcement suit in the district court, when there is a state implementation plan in effect encompassing the subject pollutant, and

Whether or not the Seventh Circuit Court of Appeals should have directly addressed itself to this question.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, B&W Investment Properties and Louis Wolf, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in the above entitled proceeding on October 24, 1994 and modified on December 2, 1994.

OPINION BELOW

The Opinion and Judgment Order of the United States Court of Appeals for the Seventh Circuit, reported as *United States of America vs. B&W Investment Properties and Louis Wolf*, No. 94-1892, appears in the Appendix at p.1. The order modifying the opinion and denying Defendants' Petition For Rehearing With Suggestion For Rehearing *En Banc* appears in the Appendix at p. 14.

JURISDICTION

The Seventh Circuit judgment in this case was entered on October 24, 1994. The jurisdiction of the Court is invoked under 28 U.S.C. Sec. 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 42 United States Code, sec. 7412(d), as in effect prior to November 15, 1990,[1] provides:

> (1) Each state may develop and submit to the Administrator a procedure for implementing and enforcing emission standards for hazardous air pollutants for stationary sources located in such State. If the Administrator finds the State procedure is adequate, he shall delegate to such State any authority he has under this chapter to implement and enforce such standards.
>
> (2) Nothing in this subsection shall prohibit the Administrator from enforcing any applicable emission standard under this section.

Title 42 United States Code, sec. 7413(a)(1) provides:

> Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of any requirement of an applicable implementation plan, the Administrator shall notify the person in violation of the plan and the State in which the plan applies of such finding. If such violation extends beyond the 30th day after the date of the administrator's notification, the Administrator may issue an order requiring such person to comply with the requirements of such plan or he may bring a civil action in accordance with subsection (b) of this section.

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[1] All references herein to the Clean Air Act will be to the Act as in effect prior to the effective date of the 1990 amendments, November 15, 1990.

Title 42 United States Code, sec. 7413(b)(2) provides:

> The Administrator shall, in the case of any person which is the owner or operator of a major stationary source, and may, in the case of any other person, commence a civil action for a permanent or temporary injunction, or to assess and recover a civil penalty of not more than $25,000 per day of violation, or both, whenever such person—
>
> * * * * *
>
> (2) Violates any requirement of an applicable implementation plan (A) during any period of Federally assumed enforcement, or (B) more than 30 days after having been notified by the Administrator under subsection(a)(1) of this section of a finding that such person is violating such requirement;. . . .

Title 42 United Stated Code, sec. 7414(a)(1) provides in pertinent part:

> For the purpose (i) of developing or assisting in the development of any implementation plan under section 7410 or section 7411(d) of this title, any standard of performance under section 7411 of this title, or any emission standard under section 7412 of this title, (ii) of determining whether any person is in violation of any such standard or any requirement of such a plan, or (iii) carrying out any provision of this chapter (except a provision of subchapter II of this chapter with respect to a manufacturer of new motor vehicles or new motor vehicle engines)—
>
> (1) The Administrator may require any person who owns or operates any emission source or who is subject to any requirement of this chapter . . . with respect to a provision of subchapter II of this chapter to (A) establish and maintain such records, (B) make such reports, (C) install use, and maintain such monitoring equipment or methods, (D) sample such emissions (in accordance with such methods, at such locations, at

such intervals, and in such manner as the Administrator shall prescribe), and (E) provide such other information as he may reasonably require;
. . . .

Title 42 U.S.C. sec. 7414(b) provides:

(1) Each State may develop and submit to the Administrator a procedure for carrying out this section in such State. If the Administrator finds the State procedure is adequate, he may delegate to such State any authority he has to carry out this section.

(2) Nothing in this subsection shall prohibit the Administrator from carrying out this section in a State.

STATEMENT OF THE CASE

A. *Procedural Statement*

On September 16, 1991, the Environmental Protection Agency caused a Complaint to be filed against B&W Investment Properties Inc. and Louis Wolf in the United States District Court for the Northern District of Illinois, seeking injunctive relief and civil penalties under Sections 112(c), 113 and 114 of the Clean Air Act (is in effect prior to November 15, 1990, 42 U.S.C. Sections 7412(c), 7413 and 7414), and the National Emissions Standards For Hazardous Air Pollutants For Asbestos, 42 C.F.R. Part 61 subpart M, and 56 Federal Regulation 1669 (the Complaint is set out in the Appendix at p. 16). In its two counts for relief, the Complaint alleged work practice (Section 112) and Notice (Section 114) violations. Defendants filed their Answer on October 11, 1991. Plaintiff filed its Motion for Summary Judgment on the issue of liability on July 14, 1992. On October 27, 1992 Plaintiff filed its Motion for Summary Judgment as to the amount of the ap-

plicable penalty. Defendants filed a Cross-Motion for Summary Judgment as to liability on August 14, 1992 and a Motion for Summary Judgment as to the amount of the applicable penalty on November 18, 1992. On September 30, 1992, the district court granted the Plaintiff's Motion for Summary Judgment as to liability and denied Defendants' Motion For Summary Judgment as to liability. On December 3, 1992 the district court denied both Plaintiff's and Defendants' respective Motions for Summary Judgment as to the amount of the applicable penalty and referred that question to a magistrate for hearing and for a report and recommendation to the district court.

A hearing before the magistrate was had on October 13, 1993 through October 15, 1993. The magistrate issued her report and recommendation on the issue of the amount of the applicable penalty on December 17, 1993. The magistrate recommended the imposition of a $1,500,000.00 penalty against Louis Wolf and a $1,675,000.00 penalty against B&W Investment Properties, Inc., with joint and several liability. The penalty assessed against Wolf amounted to three-quarters of his net worth.

Plaintiff filed its objections to the magistrate's recommendation on January 10, 1994 and Defendants filed their objections on January 18, 1994. Both parties filed their respective responses to the objections and the defendants filed a reply to the plaintiff's response. On February 17, 1994 the district court entered its Memorandum Opinion and Judgment adopting the magistrate's recommended fines. Subsequently, Defendants filed a Motion for Reconsideration of the Judgment on March 14, 1994, and their Supplemental Motion for Reconsideration on March 18, 1994. Plaintiff filed its Response to the defendants' motion on March 25, 1994. The Motion for Reconsideration was denied.

B. *Factual Statement*

Albert Berland (hereinafter referred to as "Berland") entered into a contract for the purchase of the property in issue from a third-party at the purchase price of $575,000.00. Berland became financially unable to complete the purchase so he approached Louis Wolf (hereinafter referred to as "Wolf") with regard to the latter's purchasing the property. On October 12, 1989 Wolf entered into a contract with Berland to purchase the property from him for $575,000.00. A real estate closing took place on December 7, 1989 whereupon Wolf gave the money to Berland who in turn gave the money to the third-party for the purchase of the property. The parties exchanged deeds and Wolf became the title owner. After closing, Berland negotiated an option to purchase the property back from Wolf, along with a first right of refusal if within two years Wolf had a bonafide offer to purchase the property. Thereafter, Berland prepared sales information with the Cicero Economic Development Authorities and attempted to sell the property for $1,950,000.00. The property consisted of several old, unoccupied factory buildings.

Eventually, Berland negotiated with another third-party to lease the property. The third-party was led to believe that Berland owned the property and he remitted all rent payments to him. Said payments were never received by, or on behalf of, either Wolf or B&W Investment Properties, Inc. (hereinafter referred to as B&W). Berland and the third-party also entered into a real estate sales agreement, under the terms of which the third-party would purchase the property from Berland for $1,400,000.00, contingent upon the latter's first removing the asbestos from the property. In early August, 1990 Berland contracted with S&F Construction, paid them for the removal of the asbestos and the work thereupon commenced. In so doing,

Berland took it upon himself to go beyond the express limitations on his authority and enter into contracts without the knowledge or consent of the sole owner of the property, Wolf. The asbestos in question consisted of intact boiler and pipe wrapping contained within the buildings and, as such, its then present status was in compliance with all regulatory requirements.

In the summer of 1990, Wolf suffered a heart attack and was hospitalized. The acts complained of by Plaintiff occurred while Wolf was in the Hospital. It was during this period of time that B&W learned of the third-party tenant who was paying monies to Berland and Berland admitted receiving the rents and keeping the money. The third-party testified that although he was current in his rent, he received a 5-day notice from B&W on August 31, 1990, demanding past due rent.

Wolf's sole purpose in buying the property was to turn it over to Berland for a profit. Wolf never authorized Berland or anyone else to remove asbestos from the Cicero facility. Berland was authorized to show the property to prospective buyers and to keep it secure. Although Wolf was aware that Berland was showing the property for sale, he never authorized Berland to do any work on the property other than to keep the property secure. Further, Wolf would receive no benefit from Berland's actions unless a sale was consummated at the option price.

After Berland contracted with S&F Construction for the removal of the asbestos, it, in turn, subcontracted the asbestos removal to one Juan Vasquez. Neither S&F Construction nor Juan Vasquez had any direct contact with Wolf. Likewise, Wolf had no involvement with regard to the property during his hospitalization and recovery and was unaware of the asbestos removal project.

On August 27 and 31, 1990, EPA representatives inspected the asbestos removal project, determined that Vasquez had not submitted a plan for a permit, observed large quantities of unwetted friable asbestos lying about, and immediately ordered a halt to the work. As early as August 27, 1990, Berland admitted to a representative of the EPA that Wolf, not he, owned the property. Wolf never represented to Plaintiff or anyone else that Berland was the owner but Plaintiff incorrectly believed that it was dealing with the owner in August of 1990, when actually it was dealing with Berland, who had only certain limited authority with regard to the property. On August 30, 1990 the EPA issued an order requiring all work to cease until a plan was approved for the completion of the asbestos removal. (The order is set out in the Appendix at p. 26.) This order, the sole written communication from the EPA, was addressed to B&W Investment Properties and personally served upon Berland's wife at the Berland home. Other than as stated, no further EPA inspections were carried out and no further removal work was performed at the job site until a contractor hired by the Defendants began an EPA-approved cleanup on January 21, 1991. The cleanup was completed by March 15, 1991 and the inspections thereafter demonstrated that the property was remediated of asbestos in accordance with the statute. Six months later, in September, 1991, the EPA caused its suit for injunction and penalties to be filed.

C. *Post-Trial Proceedings*

Upon denial of the Motion for Reconsideration, Defendants filed a timely Notice of Appeal on April 15, 1994. After considering the briefs and the oral arguments of counsel, the Seventh Circuit Court of Appeals affirmed the judgment of the district court by opinion and order

of October 24, 1994. On December 2, 1994, the Court denied, with one modification to its Opinion, Defendants' Petition For Rehearing With Suggestion For Rehearing *En Banc.*

REASON FOR GRANTING THE WRIT

It is undisputed that:

A) Wolf had no knowledge of the asbestos removal by Berland (Opinion, p. 4);

B) Neither defendant was ever served with a notice of violation, Berland having received, apparently through his wife, the sole written communication from the EPA (Opinion, p. 5); and

C) The Administrator of the EPA had delegated both the asbestos reporting and asbestos work practices provisions of sections 112 and 114 of the Clean Air Act to the State of Illinois (Complaint, paras. 22, 27).

Paragraph 22 of the Complaint states, *inter alia*:

> "The asbestos NESHAP at 40 C.F.R. sections 61.145 and 61.146 requires each owner or operator of a renovation operation to provide EPA with timely, advance written notice of the intention to renovate a facility. EPA has delegated implementation of the asbestos NESHAP to the State of Illinois. In Illinois, therefore, each owner or operator of a renovation operation must provide the State of Illinois with timely, advance written notice of the intention to renovate a facility. . . ."

Paragraph 27 of the Complaint states:

> "In accordance with section 112(d)(1) of the Act, 42 U.S.C. section 7412(d)(1), EPA delegated authority to the State of Illinois to implement and enforce the asbestos NESHAP. In accordance with section 112(d)(2)

> of the Act, 42 U.S.C. section 7412(d)(2), EPA retained the authority to bring an action for any violation of the Act."

42 U.S.C. sec. 113 provides the blueprint for enforcement procedures by the EPA. Subsection (a)(1) sets out the procedure to be followed whenever the Administrator believes that any person is in violation of a state implementation plan. First he must serve a notice of the violation upon that person and, if the violation continues 30 days after the date of the notice he may then issue a compliance order or institute a civil action for injunction and civil penalties in accordance with subsection (b). In the case of a violation of a state implication plan, subsection (b)(2) is applicable and reiterates the procedure set out in subsection (a)(1), to wit; a civil action may only be commenced against an owner or operator if there is a compliance failure 30 days after the date of notice to that person.

Thus, under the facts of this case, the Administrator had delegated to the State of Illinois his authority to implement and enforce both asbestos removal [42 U.S.C. sec. 112(d)(1)] and asbestos reporting requirements [42 U.S.C. sec. 114(b)(1)].

In support of their threshold argument, that 42 U.S.C. sec. 113(b)(2) incorporates as a precondition to suit the personal service of notice of violation upon the person against whom relief is sought and that this precondition is mandatory where the Administrator has delegated his enforcement authority to a state, the defendants relied upon *United States vs. General Motors Corp.*, 876 F.2d 1060, 1063 (1st Cir., 1989), affirmed, 496 U.S. 530; *United States vs. Ford Motor Co.*, 736 F. Supp. 1539, 1547 (W.D. Mo. 1990); and *United States vs. Louisiana-Pacific Corp.*, 682 F.Supp. 1122, 1128 (D. Colo. 1987).

In its opinion, the Seventh Circuit Court of Appeals agreed with Defendants' proposition that 42 U.S.C. sec. 113(b)(2) incorporates a precondition of notice to the party against whom enforcement will be sought and that that precondition is mandatory. (Opinion, p. 6.) Incredibly, however, the Court stated that subsection (b)(2) does not and could not apply to this case,

> "because section 113(b)(2), which concerns violations of state implementation plans for ambient air quality standards, *by its terms* does not apply to regulation of hazardous air pollutants. . . . Instead, asbestos, like the other hazardous air pollutants designated in section 112, is a federally regulated substance *outside the purview of state implementation plans.*" Opinion, p. 6. [EMPHASIS ADDED.][2]

The Court, initially either through error or misapprehension, treated the issue not only as if the Administrator had not in fact delegated his asbestos reporting and enforcement authority to the state of Illinois, but as if the Clean Air Act itself specifically prohibited such a delegation of authority. The law contains no such prohibition. Indeed, the three cases[3] cited by the Court in its Opinion, at pp. 6-7, in support of the proposition that no prior notice is required before the EPA may institute a civil

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[2] Later in the Opinion, at p. 7, the Court discussed the benefits of the policy and the salutory nature of the 30-day notice requirement in the case of state implementation plans and stated,

> "In the case of hazardous air pollutant regulation, *where there are no state implementation plans to enforce*, there is less reason to defer action or to await the state's response." [EMPHASIS ADDED.]

[3] *Dow Chemical Co. vs. Environmental Protection Agency*, 635 F.Supp. 126 (M.D.La. 1986); *United States vs. Hugo Key and Son, Inc.*, 731 F.Supp. 1135 (D. R.I. 1989); and *United States vs. Tzavah Urban Renewal Corp.*, 696 F. Supp. 1013 (D. N.J. 1988).

action all involved direct actions either by or against the EPA without reference to so much as the existence of state implementation plans let alone any holdings that in the case of asbestos, approved state implementation plans may be disregarded and treated as non-existent. The law containing no such prohibition and the facts being to the contrary, this treatment of the issue constituted a total disregard of both the law and the facts.

In their Petition For Rehearing, the defendants specifically identified and pointed out the applicable state and federal statues and regulations whereby the state of Illinois adopted in whole the federal Clean Air Act, including enforcement provisions, and the Administrator approved that adoption and delegated, as stated in paras. 22 and 27 of the Complaint, his authority in connection with asbestos reporting and enforcement requirements. (A copy of the relevant Argument portion of the said Petition is set out in the Appendix at p. 35.) Upon being so apprised,[4] the Court modified the slip opinion by striking "outside the purview of state implementation plans," and substituting "for which apparently no state implementation plan was involved." (See Order of December 2, 1994 at Appendix, p. 14.) Defendants contend that this response was unresponsive and inadequate. There was in fact a state implementation plan in effect for asbestos and thus the issue

[4] It must be admitted that the bold statement in Defendants' opening brief before the Court of Appeals that, "the Plaintiff alleged jurisdiction under Section 7413(b)(2) of the . . . Clean Air Act. . . ." was not supported by any reference to the Complaint, specifically paras. 22 and 27 thereof, and further the claimed allegation of jurisdiction was incorrect in that the Complaint, at para. 2, simply made a generalized jurisdictional reference to 42 U.S.C. section 7413(b). However, nowhere within the Complaint did the EPA claim that it was specifically proceeding pursuant to 42 U.S.C. sections 113(b)(3) or (4), as it later argued.

that should have been decided by the Court was could the EPA disregard the mandatory notice requirement of 42 U.S.C. sec. 7413(b)(2) and proceed, in a case involving asbestos, directly under 42 U.S.C. section 7413(b)(3) if it so chose, and as it indeed did in this case. Unfortunately for the defendants, this issue, one of first impression,[5] was never directly addressed and decided by the Court. Further, by avoiding resolution of the general issue of notice, no conflict among the circuits was created, but claiming that asbestos is outside the purview of state implementation plans is simply incorrect. Lastly, by stating within the four corners of the Opinion that under the instant facts no state implementation plan, and thus no prior notice, is involved, the Opinion is a "correct" one as a matter of law if not of fact. But by disregarding the uncontested facts in such a way as to affirm a judgment against an individual, Wolf, that constitutes three-quarters of his net worth, the Seventh Circuit Court of Appeals has, in the words of this Court's Rule 10.1(a), so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision by either granting the writ of certiorari prayed for or, after considering any response from the government, directly remanding the case to the Court of Appeals by *per curiam* order with instructions to decide the threshold notice issue as argued above.

CONCLUSION

For the foregoing reasons, Defendants pray that this Court exercise its supervisory authority and grant their Petition For Writ of Certiorari or, in the alternative, re-

[5] The three notice cases relied upon by Defendants did not involve asbestos emissions.

mand the matter to the Seventh Circuit Court of Appeals with instructions to decide the issue of whether or not pre-suit notice was required under the instant facts. The 1990 amendments have not removed, and thus mooted, the requirement of pre-suit notice in violation cases involving state implementation plans (see 42 U.S.C. sec. 7413(a)(1), (b)(1), and 42 U.S.C. sec. 7412(l) of the current Act).

Respectfully submitted,

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February, 1995

APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 94-1892

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

B & W INVESTMENT PROPERTIES and LOUIS WOLF,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 91 C 5886—**Charles P. Kocoras,** *Judge.*

ARGUED SEPTEMBER 7, 1994—DECIDED OCTOBER 24, 1994

Before CUMMINGS, BAUER and CUDAHY, *Circuit Judges.*

CUMMINGS, *Circuit Judge.* This suit involves a civil action by the United States Environmental Protection Agency (the "EPA") against two defendants for violations of sections 112 and 114 of the Clean Air Act (the "Act"), 42 U.S.C. §§ 7412(c) and 7414, and the National Emissions Standards for Hazardous Air Pollutants for Asbestos (the asbestos "NESHAP"), 40 C.F.R. Part 61 subpart M.[1]

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[1] The Clean Air Act and the applicable regulations were amended in November 1990. Since the events at issue occurred prior to the amendment date, the district court applied pre-amendment law, with the exception that the court relied on the expanded post-amendment list of mitigating factors in determining the penalty. Mem. Op. at 6, n.1 (Sept. 30, 1992); Mem. Op. at 8 (Feb. 17, 1994).

The United States District Court for the Northern District of Illinois granted summary judgment for the EPA and imposed fines of $1,500,000 and $1,675,000, respectively, on defendants Louis Wolf and B & W Investment Properties, Inc.

Defendants argue on appeal that because the Environmental Protection Agency failed to provide notice before initiating the action, the trial court erred in imposing a statutory penalty; that the court improperly found B & W Investment Properties, Inc. liable; and that the fine was excessive and unsupported in its amount. For the reasons set forth below, the judgment of the district court is affirmed.

STATUTORY BACKGROUND

The Clean Air Act sets forth regulations for the control of air quality, several of which are at issue here. Section 112 of the Act authorizes the EPA to establish national emission standards for any air pollutant deemed "hazardous," for which no ambient air quality standard is applicable.[2] Section 112(c) prohibits the construction or modification of existing sources that will emit hazardous air pollutants, and further prohibits emissions of such air pollutants which violate emission standards. Section 114 authorizes the EPA to establish reporting requirements to assist the agency in developing emission standards and monitoring compliance. The asbestos NESHAP, *inter alia*, requires written notification to the EPA before renovation that could result in emissions and establishes specific standards for the treatment of asbestos—primarily, for purposes of this case, that it be adequately wetted until collected for disposal, so that asbestos particles cannot become airborne.[3] 40 C.F.R. 61.147. These regulations ap-

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[2] Asbestos was among the earliest air pollutants designated hazardous under the Act. 36 Fed. Reg. 5931.

[3] Dry or friable asbestos poses a particular danger during construction or renovation activities because it can easily become air-

(Footnote continued on following page)

ply to all owners or operators, defined as "any person who owns, leases, operates, controls or supervises" a property in violation. 40 C.F.R. 61.45. The Act and asbestos NESHAP impose strict liability on violators.

The EPA is authorized to pursue violations of sections 112 and 114 and the asbestos NESHAP under section 113 of the Act, 42 U.S.C. § 7413. This section sets forth federal enforcement procedures for the issuance of compliance orders and civil actions, and provides for civil penalties not to exceed $25,000 per day of violation.

FACTS

Defendant Louis Wolf purchased the parcel in question, consisting of 5.5 acres and four vacant buildings in Cicero, Illinois, on December 7, 1989. Mr. Wolf made the $575,000 deal at the behest of fellow real estate developer Albert Berland. In a somewhat Byzantine transaction, Mr. Berland retained a two-year option to purchase the land from Mr. Wolf at a higher rate, and a right of first refusal if Mr. Wolf received other offers. In the meantime, Mr. Wolf authorized Mr. Berland to show the property to potential buyers.

In May 1990, having failed to sell the property, Mr. Berland leased an undeveloped portion of the parcel to David Moss of C & M Parking to use as a storage lot. Mr. Berland signed the agreement with Mr. Moss as an agent for a corporate entity called B & W Investment Properties, Inc. ("B & W"). At the same time, unbeknown to Mr. Wolf, Mr. Berland entered into negotiations with Mr. Moss regarding the eventual sale of the entire parcel for $1,400,000, contingent on the removal of existing asbestos from the vacant buildings.

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[3] *continued*

borne. The asbestos NESHAP defines friable asbestos as "material containing more than 1 percent asbestos by weight that hand pressure can crumble, pulverize, or reduce to powder when dry." 40 C.F.R. 61.141.

To facilitate the pending sale to Mr. Moss, Mr. Berland hired a contractor to remove the asbestos. Work began on August 10, 1990—unfortunately, without the requisite prior notice to the EPA. Further, the contractor apparently failed to adhere to the safety regulations set forth in the asbestos NESHAP, performing the removal in such a way that friable asbestos could enter the air. This danger was particularly serious because the parcel abutted a Chicago Transit Authority commuter rail stop.

In the meantime, unaware of the asbestos removal work at the site, Mr. Wolf had entered the hospital for treatment of a heart condition in late July or early August 1990. During this time B & W acted as his management company.

On August 27 and 31, following an anonymous tip regarding the renovation activity at the parcel, the EPA ordered a halt to the asbestos removal and sent investigators to the site. These investigators discovered large quantities of unwetted friable asbestos. The investigators also noted that the parcel was not safely secured, that individual buildings had open or broken windows and in one case a hole in the roof, and that no warning signs had been posted to alert individuals to the danger of asbestos exposure.

On August 30, 1990, the EPA issued an order—addressed to B & W Investment Properties but apparently received only by Mr. Berland—regarding asbestos cleanup at the parcel. The order required cessation of the cleanup until the EPA approved a plan for disposal of the previously disturbed asbestos, and required compliance with the Clean Air Act and asbestos NESHAP regarding any further activities. Some time later (the parties differ as to the exact date), Mr. Wolf learned of this order. After further delay, a contractor hired by Mr. Wolf as agent for B & W began EPA-approved cleanup on January 21, 1991; work was complete on March 13-15, 1991.

On September 16, 1991, the EPA filed suit for enforcement and penalties pursuant to 42 U.S.C. § 7413(b), alleg-

ing that the defendants had commenced asbestos removal without proper notification to the EPA, and that they had violated the Act and the asbestos NESHAP by failing to wet friable asbestos material adequately. On September 30, 1992, the district court granted summary judgment for the government. On February 17, 1994, following a hearing before the magistrate judge regarding penalties, the district court entered a judgment against Mr. Wolf and B & W. The decision assessed a joint and several fine of $1,675,000 against both defendants for the wetting violations. This sum represented the statutory maximum of $25,000 per day for 67 days, from November 15, 1990 until the approved cleanup began on January 21, 1991. The court reduced Mr. Wolf's liability for the joint and several fine of $1,675,000 to $1,500,000, based on his ability to pay, and imposed no fines on either Mr. Wolf or B & W for the notice violation.

DISCUSSION

I.

Defendants initially contend that the Act requires the EPA to give notice to a violator as a precondition to filing suit. Since neither Mr. Wolf nor B & W was ever properly served with notice (Mr. Berland received the sole written communication from the EPA, and the record is devoid of evidence that he passed it along), defendants submit that the district court erred in granting summary judgment for plaintiff on the liability issue. We review de novo the statutory interpretation behind the district court's decision. *Erickson v. Trinity Theatre, Inc.*, 13 F.3d 1061, 1067 (7th Cir. 1994).

A.

In support of their notice argument, defendants rely on section 113(b)(2) of the Act, which states that the EPA may commence suit when any person "violates any requirement of an applicable implementation plan . . . more

than 30 days after having been notified by the Administrator under subsection (a)(1) of this section of a finding that such person is violating such requirement." 42 U.S.C. § 113(b)(2). Numerous courts, defendants correctly note, have interpreted this language to incorporate a precondition of notice. *See United States v. General Motors Corp.*, 876 F.2d 1060, 1063 (1st Cir. 1989), affirmed, 496 U.S. 530; *United States v. Ford Motor Co.*, 736 F. Supp. 1539, 1547 (W.D. Mo. 1990); *United States v. Louisiana-Pacific Corp.*, 682 F. Supp. 1122, 1128 (D. Colo. 1987) (all reading the notice of violation provision as mandatory).

However, as plaintiff has pointed out, the EPA did not rely on the enforcement provision of section 113(b)(2). In fact the EPA could not, because section 113(b)(2), which concerns violations of state implementation plans for ambient air quality standards, by its terms does not apply to regulation of hazardous air pollutants. There are no ambient air quality standards for hazardous air pollutants such as asbestos. 42 U.S.C. § 7412 (" 'hazardous air pollutant' means an air pollutant to which no ambient air quality standard is applicable"). Instead, asbestos, like the other hazardous air pollutants designated in section 112, is a federally regulated substance outside the purview of state implementation plans. *Id.* Section 112(e)(1) of the Act authorizes the EPA Administrator to promulgate work practice standards for pollutants for which there are no feasible emission standards; the asbestos NESHAP constitutes just such a response. *Id.*

Section 113(b)(3), which vests authority in the EPA to pursue violations of section 112(c), simply states that the EPA may issue compliance orders or commence civil actions "whenever" the agency finds a violation. 42 U.S.C. § 7413(b)(3). On its face, the Act imposes no duty on the EPA to provide notice of violations of section 112 before commencing an action for injunction or civil penalties. *See Dow Chemical Co. v. U.S. Environmental Protection Agency*, 635 F. Supp. 126, 130 (M.D. La. 1986) (stating that "no preliminary notice is required for the enforcement of regulations dealing with hazardous air pollutants under

42 U.S.C. § 7412"); *see also United States v. Hugo Key and Son, Inc.*, 731 F. Supp. 1135 (D. R.I. 1989) (setting forth the elements of a NESHAP violation simply as violation of applicable work-practice standards); *United States v. Tzavah Urban Renewal Corp.*, 696 F. Supp. 1013, 1021 (D. N.J. 1988) (holding that in order to establish liability under the asbestos NESHAP, the government must prove "only . . . (1) that defendants are owners or operators of a stationary source; (2) that asbestos-containing material was present in the facility being renovated, and (3) that specific requirements of the regulations have been violated." (citation omitted)).

B.

The distinction between hazardous air pollutants and other air pollutants is reflected throughout the Act's treatment of federal enforcement procedures. Section 113(a), like section 113(b), distinguishes violations of state implementation plans from section 112 violations, and similarly incorporates an explicit notice requirement into the former but not into the latter. *Compare* 42 U.S.C. § 7413(a)(1) *with* 42 U.S.C. § 7413(a)(3).

Section 113(a) makes clear that the notice of violation requirement for state implementation plans serves a different function than simply alerting the violator. Section 113(a)(1) requires 30-day notification of both the violator and the state, allowing the state to act to enforce its own implementation plan before the EPA steps in. *See Baughman v. Bradford Coal Co., Inc.*, 592 F.2d 215 (3rd Cir. 1979), certiorari denied, 441 U.S. 961 (state implementation plans are enforceable by either the state or the EPA). This is consistent with the overall goals of the Clean Air Act and its 1970 Amendments, which increased the federal government's role in air quality control while preserving the locus of primary responsibility within state and local governments. *See General Motors*, 876 F.2d 1060. In the case of hazardous air pollutant regulation, where there are no state implementation plans to enforce, there is less reason to defer action or to await the state's response.

C.

Regardless of their lack of formal written notice, it is clear that defendants had actual notice of the violations well before the penalty period began. The EPA notified Mr. Berland, a close friend of Mr. Wolf's, on August 30, 1990, some two and a half months before any penalties ensued. Defendant admitted in his responses to interrogatories that he became aware of the problems at the parcel by late September or early October. The district court found that defendants knew of the asbestos violations by October 15 but nevertheless delayed the date at which penalties began accruing until November 15, 1990, giving the defendants a 30-day grace period to begin rectifying the situation. To the extent that defendants now make an equitable claim against the enforcement of the Act's penalty provisions, their awareness of the asbestos problem as of October renders that claim hollow.

II.

B & W also disputes its characterization as an "owner or operator" strictly liable for violations of the Act. B & W raised this issue for the first time in a motion for reconsideration filed 27 days after the district court entered summary judgment against the corporation. This Court can review the denial of that motion only for clear abuse of discretion. *Industrial Associates, Inc. v. Goff Corp.*, 787 F.2d 268, 269, 270 (7th Cir. 1986).

The asbestos NESHAP extends liability beyond nominal owners of a property to all those who lease, operate, control, or supervise it. 40 C.F.R. 61.02. While the proceedings below demonstrate a great deal of confusion as to whether Mr. Wolf acted as B & W's agent, B & W as Mr. Wolf's agent, Mr. Berland as B & W's agent or B & W as an independent corporation performing management services for Mr. Wolf during the relevant time frame, there is no debate that B & W was authorized to and did exercise control over the parcel sufficient to bring the company within the scope of the "owner or operator" designation.

B & W's name appears on the lease to Moss, on legal papers initiated against Moss in August 1990, and on the contract with the asbestos company that performed the cleanup after the EPA ordered compliance.

Clearly, the district judge was justified in concluding that B & W was an "owner or operator" within the terms of the asbestos NESHAP. Having been deemed an owner or operator, B & W has no valid challenge against application of the Act, regardless of how minimal the company's responsibilities or knowledge may actually have been. The Act imposes strict liability on all owners and operators of properties in violation of the Act. *See, e.g., United States v. Hugo Key and Son*, 731 F. Supp. 1135, 1137 (D. R.I. 1989); *United States v. Ben's Truck and Equipment, Inc.*, 17 Env'tl L. Rep. 20,777 (E.D. Cal. 1986) ("the Act and the asbestos NESHAP provide strict liability for civil violations of their provisions. . . . Strict liability is essential to meet the purpose of the Act to protect and improve the quality of the nation's air."). Thus the judge did not abuse his discretion in imposing liability on B & W.

III.

Defendants challenge the amount of the penalty imposed by the district court pursuant to the recommendations of Magistrate Judge Gottschall, arguing that the court (1) set an improper date for the period of penalty; (2) failed to mitigate the penalty amount; and (3) excessively punished defendants relative to the sentences imposed on other, similarly situated defendants in Clean Air Act cases. These contentions, which we review only for abuse of discretion, merit little discussion. *U.S. Environmental Protection Agency v. Environmental Waste Control, Inc.*, 917 F.2d 327, 335 (7th Cir. 1991), certiorari denied, 111 S. Ct. 1621 (assessment of a civil penalty "is committed to the informed discretion of the trial court.").

A.

With respect to the penalty amount, defendants contend that the court below erred as to the date at which Wolf learned of the violations. The district court delayed imposition of the penalty until November 15, 30 days after the date it found that Mr. Wolf knew of the violations, reasoning that 30 days gave Mr. Wolf sufficient time to begin removing the asbestos. Mr. Wolf now argues that the penalty clock should not begin ticking until December 5, since he claims he did not know of the violations until November 5.

This argument fails to recognize that the Act does not require courts to toll the penalty period until violators possess actual knowledge. Technically, the Act imposes strict liability from the first day of the offense. The government asserted at oral argument that the assessment of civil penalties in the case of hazardous air pollutants requires no notice whatsoever to the violator. In the case of Mr. Wolf, who was incapacitated in the hospital with a heart ailment when the asbestos violations began, this assertion gives us serious pause: it would hardly seem fair to charge him $25,000 a day for events totally outside his knowledge. But the magistrate judge used her informed discretion (a) to determine that Mr. Wolf had actual knowledge of the asbestos problems by October 15, a finding amply supported by the evidence, and (b) to toll the penalty period for an additional 30 days to allow clean-up to commence. While we feel that the Clean Air Act's penalty provisions must out of fundamental fairness contain an implied requirement of reasonableness, the court acted well within its discretion in starting the penalty period on November 15.

B.

Defendants further contend that the lower court misapplied the penalty criteria set forth in section 113(e) of the Act, which authorizes consideration of:

> (in addition to such other factors as justice may require) the size of the business, the economic impact of the penalty on the business, the violator's full compliance history and good faith efforts to comply, the duration of the violation as established by any credible evidence . . . payment by the violator of penalties previously assessed for the same violation, the economic benefit of noncompliance, and the seriousness of the violation.

42 U.S.C. § 7413(e).

The district court held that none of these factors mandated a reduction in the size of the penalty. Defendants dispute the district court's application of the mitigating factors point by point, but their efforts are unavailing. In considering fines under the Act, courts generally presume that the maximum penalty should be imposed. *United States v. Midwest Suspension and Brake*, 824 F. Supp. 713, 735 (E.D. Mich. 1993). The Act does not prescribe with precision how or with what weight to apply the mitigating factors, and the district court did not abuse its discretion in deciding that the seriousness of the violation, which one EPA investigator called "probably the single most contaminated site I have seen," its duration, and the delay before remediation, merited imposition of the statutory maximum.

C.

Defendants also complain that compared to fines imposed on other Clean Air Act defendants, the joint and several penalty of $1,675,000 (for which Mr. Wolf's liability was reduced to $1,500,000) issued in this case is excessive. Comparisons with other cases, many of which resulted in plea agreements or did not involve asbestos, do not illuminate the treatment that should be accorded these defendants. There is ample evidence in the record to support the fine imposed by the lower court.

IV.

Finally, defendants contend that the magistrate judge erred in excluding from evidence an EPA internal memorandum which, they argue, bolsters their contention that the parcel was in better and safer condition than the EPA admitted. Defendants seek on appeal to characterize this document as an admission against interest. The magistrate judge, accepting testimony that the author of the memorandum viewed it as a hypothetical exercise regarding a fictitious piece of property, excluded the memorandum on relevance grounds. Her decision is reviewable only for abuse of discretion. *Taylor v. National R.R. Passenger Corp.*, 920 F.2d 1372, 1375 (7th Cir. 1990). Counsel for defendants failed to explain how a memorandum by someone completely in the dark about the circumstances in this case could assist in factfinding. The EPA memorandum was properly excluded.

Judgment affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT – WITHOUT ORAL ARGUMENT

Date: October 24, 1994

BEFORE:

Honorable WALTER J. CUMMINGS, Circuit Judge
Honorable WILLIAM J. BAUER, Circuit Judge
Honorable RICHARD D. CUDAHY, Circuit Judge

No. 94-1892

UNITED STATES OF AMERICA,

Plaintiff-Appellee

vs.

B & W INVESTMENT PROPERTIES and LOUIS WOLF,

Defendants-Appellants

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 91 C 5886—Charles P. Kocoras, Judge.

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

December 2, 1994.

Before

Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. WILLIAM J. BAUER, Circuit Judge
Hon. RICHARD D. CUDAHY, Circuit Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 94-1892 vs.

B & W INVESTMENT PROPERTIES and LOUIS WOLF,
Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 91 C 5886—Charles P. Kocoras, *Judge*.

ORDER

On consideration of the petition for rehearing with suggestion for rehearing *en banc* filed by defendants-appellants on November 21, 1994, lines 12-13 of the first paragraph on page 6 of the October 24, 1994, slip opinion are amended by striking "outside the purview of state implementation plans" and substituting "for which apparently no state implementation plan was involved."

No judge in active service has requested a vote on the suggestion for rehearing *en banc* and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

[Received September 16, 1991]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

B&W INVESTMENT PROPERTIES, INC.
and LOUIS WOLF,

Defendants.

Action No. 91 C 5886
Judge Kocoras
Magistrate Judge Gottschall

COMPLAINT

Plaintiff, the United States of America, by the authority of the Attorney General and at the request of the Administrator of the United States Environmental Protection Agency ("EPA"), alleges as follows:

NATURE OF THE ACTION

1. This is a civil action against the defendants, B&W Investment Properties, Inc. and Louis Wolf for injunctive relief and civil penalties under section 113 of the Clean Air Act (the "Act"), 42 U.S.C. § 7413, for violations of sections 112(c) and 114 of the Act, 42 U.S.C. § 7412(c) and § 7414 (as in effect before the amendments of November

15, 1990, Pub. L. No. 101-549, 104 Stat. 2399), and the National Emissions Standards for Hazardous Air Pollutants for asbestos (the "asbestos NESHAP"), 42 C.F.R. Part 61, Subpart M (as in effect before the amendments of 55 Fed. Reg. 48406 (Nov. 20, 1990) and 56 Fed. Reg. 1669 (Jan. 16, 1991)). This action is based on violations that occurred during the renovation of buildings containing friable asbestos materials within the meaning of 40 C.F.R. § 141, and located at or near 1926 South 54th Avenue, Cicero, Cook County, Illinois.

JURISDICTION AND VENUE

2. This Court has jurisdiction over the subject matter of this action under section 113(b) of the Act, 42 U.S.C. § 7413(b), and under 28 U.S.C. §§ 1331, 1345, and 1355.

3. This Court has jurisdiction over the defendants and venue properly lies in this district under section 113(b) of the Act, 42 U.S.C. § 7413(b), and under 28 U.S.C. § 1391(b), because the violations alleged in this action occurred within this district at a building located at or near 1926 South 54th Avenue, Cicero, Cook County, Illinois.

AUTHORITY

4. Authority to bring this action is vested in the United States Department of Justice under section 305 of the Act, 42 U.S.C. § 7605, and under 28 U.S.C. §§ 516 and 519.

NOTICE

5. Notice of the commencement of this action has been given to the State of Illinois, as provided under section 113(b) of the Act, 42 U.S.C. § 7413(b).

DEFENDANTS

6. Defendant B&W Investment Properties, Inc. ("B&W") is a corporation organized under the laws of the State of Illinois and is registered to conduct business in the State of Illinois, with its principal place of business located at 134 North LaSalle Street, Suite 1624, Chicago, Illinois. B&W is primarily in the business of property investment and management.

7. Defendant Louis Wolf of 253 East Delaware, Chicago, Illinois, at all times relevant to the matters alleged herein, had a controlling interest in B&W.

8. Each defendant is a "person" within the meaning of section 302(e) of the Act, 42 U.S.C. § 7602(e).

9. Each defendant is an "owner or operator" within the meaning of sections 111(a)(5) and 112(a)(3) of the Act, 42 U.S.C. §§ 7411(a)(5) and 7412(a)(3), and 40 C.F.R. § 61.02.

STATUTORY AND REGULATORY BACKGROUND

10. Section 112(b) of the Act, 42 U.S.C. § 7412(b), authorizes the Administrator of EPA ("the Administrator") to publish a list of air pollutants that he determines are hazardous.

11. A "hazardous air pollutant", as defined in section 112(a)(1) of the Act, 42 U.S.C. § 7412(a)(1), is an air pollutant "to which no ambient air quality standard is applicable and which in the judgment of the Administrator causes, or contributes to, air pollution which may reasonably be anticipated to result in an increase in mortality or an increase in serious irreversible, or incapacitating irreversible, illness."

12. Section 112(b) of the Act, 42 U.S.C. § 7412(b), authorizes the Administrator to prescribe an emission standard for each hazardous air pollutant. These emission standards constitute the National Emission Standards for Hazardous Air Pollutants ("NESHAP").

13. Section 112(e)(1) of the Act, 42 U.S.C. § 7412(e)(1), provides that where the establishment of an emission standard for a hazardous air pollutant is not feasible, the Administrator may instead promulgate a work practice standard, or other appropriate standard, for that pollutant. Section 112(e)(5) of the Act, 42 U.S.C. § 7412(e)(5), provides that any such work practice standard shall be treated as an "emission standard."

14. Pursuant to section 112(b) of the Act, 42 U.S.C. § 7412(b), the Administrator identified asbestos as a hazardous air pollutant. Pursuant to section 112(e) of the Act, 42 U.S.C. § 7412(e), the Administrator determined that it is not feasible to prescribe or enforce emission standards for asbestos. Accordingly, the Administrator promulgated work practice standards to regulate asbestos emissions. These regulations, referred to herein as the "asbestos NESHAP", are codified at 40 C.F.R. Part 61, Subpart M, §§ 61.140-61.156. The asbestos NESHAP contains work practice standards pursuant to section 112(b) and (e) of the Act, 42 U.S.C. § 7412(b) and (e), including regulations relating to the emission, handling, and disposal of asbestos.

15. The asbestos NESHAP at 40 C.F.R. § 61.141 defines "friable asbestos" material as "material containing more than 1 percent asbestos by weight that hand pressure can crumble, pulverize, or reduce to powder when dry."

16. The general provisions of the NESHAP regulations, applicable to the asbestos NESHAP, define an "owner

or operator" at 40 C.F.R. § 61.02 as "any person who owns, leases, operates, controls, or supervises a stationary source."

17. Section 111(a)(3) of the Act, 42 U.S.C. § 7411(a)(3), defines "stationary source" as "any building, structure, facility, or installation which emits or may emit any air pollutant." The general provisions of the NESHAP regulations define "stationary source" at 40 C.F.R. § 61.02 as "any building, structure, facility or installation which emits or may emit any air pollutant which has been designated as hazardous by the Administrator."

18. The asbestos NESHAP at 40 C.F.R. § 61.141 defines "renovation" in relevant part as "altering in any way one or more facility components."

19. The asbestos NESHAP at 40 C.F.R. § 61.141 defines "facility component" as "any pipe, duct, boiler, tank, reactor, turbine, or furnace at or in a facility; or any structural member of a facility."

20. The asbestos NESHAP at 40 C.F.R. § 61.141 defines "facility" as "any institutional, commercial, or industrial structure, installation, or building (excluding apartment buildings having no more than four dwelling units)."

21. Section 114(a) of the Act, 42 U.S.C. § 7414(a), authorizes the Administrator of EPA to establish reporting requirements applicable to owners and operators of emission sources subject to various requirements promulgated under section 112 of the Act, 42 U.S.C. § 7412, including the asbestos NESHAP, to enable EPA to determine whether an owner or operator has violated section 112 of the Act.

22. The asbestos NESHAP at 40 C.F.R. §§ 61.145 and 61.146 requires each owner or operator of a renovation

operation to provide EPA with timely, advance written notice of the intention to renovate a facility. EPA has delegated implementation of the asbestos NESHAP to the State of Illinois. In Illinois, therefore, each owner or operator of a renovation operation must provide the State of Illinois with timely, advance written notice of the intention to renovate a facility. When a renovation operation involves stripping or removing at least 80 linear meters (260 linear feet) of friable asbestos materials from pipes, or at least 15 square meters (160 square feet) of friable asbestos materials from other facility components, notice regarding the renovation must be given as early as possible before renovation begins. 40 C.F.R. §§ 61.145 and 61.146(b)(4).

23. The asbestos NESHAP at 40 C.F.R. §§ 61.145 and 61.146(c) also requires the owners or operators of renovation projects to provide accurate information in the notification regarding, among other things, the estimated amount of friable asbestos material in the facility, the location of the facility being renovated, the methods to be used to remove the asbestos, and the scheduled start and completion dates of the renovation. 40 C.F.R. §§ 61.145 and 61.146(c).

24. The asbestos NESHAP at 40 C.F.R. §§ 61.145 and 61.147 requires each owner or operator of a renovation activity to follow specific standards for the handling and disposal of friable asbestos material if the building being demolished or renovated contains at least 80 meters (260 linear feet) of friable asbestos material on pipes or at least 15 meters (160 square feet) of friable asbestos on other facility components.

25. The asbestos NESHAP requires the operator of a renovation operation to follow specific standards for the

handling and disposal of friable asbestos materials. 40 C.F.R. §§ 61.145(d), 61.147, and 61.152.

26. The asbestos NESHAP at 40 C.F.R. § 61.147(e)(1) requires that friable asbestos material that has been removed or stripped be adequately wetted to ensure that it remains wet until it is collected for disposal.

27. In accordance with section 112(d)(1) of the Act, 42 U.S.C. § 7412(d)(1), EPA delegated authority to the State of Illinois to implement and enforce the asbestos NESHAP. In accordance with section 112(d)(2) of the Act, 42 U.S.C. § 7412(d)(2), EPA retained the authority to bring an action for any violation of the Act.

28. Section 112(c) of the Act, 42 U.S.C. § 7412(c), prohibits any stationary source from emitting any air pollutant in violation of any NESHAP promulgated by the Administrator of EPA. A violation of a NESHAP is a violation of section 112(c) of the Act.

29. Section 113(b) of the Act, 42 U.S.C. § 7413(b), provides that the Administrator of EPA may commence a civil action for an injunction or for the assessment of a civil penalty of up to $25,000 per day for each violation, or both, whenever any person fails or refuses to comply with any requirement of section 112(c) or 114 of the Act, 42 U.S.C. §§ 7412(c) or 7414.

FACTUAL BACKGROUND

30. The property located at or near 1926 South 54th Avenue in Cicero, Cook County, Illinois is part of blocks 6 and 18 in Grant Land Association's Resubdivision in section 21, township 39 north, range 13 east of the third principal meridian, covering approximately 5.5 acres.

31. On or about August 31, 1990, the property located at or near 1926 South 54th Avenue in Cicero, Cook County, Illinois included four buildings ("the buildings").

32. The buildings are a "facility" as defined by the asbestos NESHAP at 40 C.F.R. § 61.141 (hereinafter "the facility").

33. The facility is a "stationary source" as defined by section 111(a)(3) of the Act, 42 U.S.C. § 7411(a)(3), and the asbestos NESHAP at 40 C.F.R. § 61.02 because it emitted or had the capacity to emit asbestos.

34. On or about August 31, 1990, the facility contained more than 260 linear feet (80 linear meters) of friable asbestos materials on pipes and at least 160 linear square feet (15 square meters) of friable asbestos materials on other facility components.

35. On or about August 31, 1990, defendants were the owners or operators of a stationary source because they jointly or individually owned, leased, operated, controlled, or supervised the facility, which was the subject of a renovation operation.

FIRST CLAIM FOR RELIEF
(WORK PRACTICE VIOLATION)

36. Plaintiff realleges and incorporates by reference paragraphs 1-35 above.

37. Defendants failed to adequately wet friable asbestos materials at the facility to ensure that the friable asbestos materials remained wet until collected for disposal, in violation of section 112 of the Act, 42 U.S.C. § 7412, and 40 C.F.R. § 61.147(e)(1) of the asbestos NESHAP.

38. Under section 113(b) of the Act, 42 U.S.C. § 7413(b), each defendant is subject to injunctive relief and to a civil penalty for up to $25,000 per day for each violation of section 112(c) of the Act, 42 U.S.C. § 7412(c).

39. Unless restrained by order of this Court, defendants will continue to violate the requirements of the Act, 42 U.S.C. § 7401, *et seq.*, and the asbestos NESHAP, 40 C.F.R. Part 61, Subpart M.

SECOND CLAIM FOR RELIEF
(NOTICE VIOLATION)

40. Plaintiff realleges and incorporates by reference paragraphs 1-35 above.

41. Defendants failed to submit notification of intent to renovate as soon as possible before the start of the renovation operation at the facility, in violation of section 114 of the Act, 42 U.S.C. § 7414, and 40 C.F.R. § 61.146(b)(3) of the asbestos NESHAP.

42. Under section 113(b) of the Act, 42 U.S.C. § 7413(b), each defendant is subject to injunctive relief and to civil penalties of up to $25,000 per day for each violation of section 114 of the Act, 42 U.S.C. § 7414.

43. Unless restrained by order of this Court, defendants will continue to violate the requirements of the Act, 42 U.S.C. § 7401, *et seq.*, and the asbestos NESHAP, 40 C.F.R. Part 61, Subpart M.

PRAYER FOR RELIEF

WHEREFORE, plaintiff, the United States of America, prays that this Court enter judgment in its favor against defendants B&W Investment Properties, Inc. and Louis Wolf, and that this Court:

A. award the United States civil penalties against each defendant of not more than $25,000 per day for each violation of the Act and the regulations promulgated thereunder;

B. permanently enjoin defendants from further violations of the Clean Air Act and the asbestos NESHAP;

C. award the United States its costs and disbursements incurred in this action; and

D. grant such other relief as the Court may deem just and proper.

Respectfully submitted,

/s/ John C. Cruden
Chief, Environmental Enforcement Section
Environment and Natural Resources Division
United States Department of Justice
Washington, DC 20530

/s/ Thaddeus R. Lightfoot
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Fred Forman
United States Attorney
Northern District of Illinois

By: /s/ Linda A. Wawzenski
Assistant United States Attorney
Northern District of Illinois
219 South Dearborn Street
Chicago, Illinois 60604
312/353-1994

[*Letterhead Of*]

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 5
230 SOUTH DEARBORN ST.
CHICAGO, ILLINOIS 60604

HAND DELIVERED

B and W Investment Properties
134 N. LaSalle Street — Suite 1126
Chicago, Illinois 60602

Re: Asbestos Removal at
1954 S. 54th Avenue
Chicago, Illinois

To Whom It May Concern:

Enclosed is an order issued this day by the United States Environmental Protection Agency (U.S. EPA), Region V, which requires the cessation of all renovation activities at 1954 S. 54th Avenue, Cicero, Illinois. Renovation activities shall not resume and demolition shall not begin until it has been demonstrated to U.S. EPA that all previously distributed asbestos containing material has been properly cleaned up and disposed of in accordance with applicable regulations.

Your prompt attention to this matter will prevent further violation of the National Emission Standards for Hazardous Air Pollutants.

Sincerely yours,

Shirley A. Mitchell for
David Kee, Director
Air and Radiation Division

Enclosure

* * * * *

[Dated August 30, 1990]

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION V

In the matter of:

B and W Investment Properties
Chicago, Illinois

Proceeding Pursuant to §§ 113(a)(3)
and 114(a)(ii) of the Clean Air Act
as amended, 42 U.S.C. §§ 7413(a)(3)
and 7414(a)(ii)

Administrative Order
EPA-5-90-A-113(a)-35

STATUTORY AUTHORITY

The following order and information request is issued pursuant to Sections 113(a)(3) and 114(a)(ii) of the Clean Air Act as amended, 42 U.S.C. §§ 7413(a)(3) and 7414(a)(ii).

Under Section 114(a)(ii) of the Clean Air Act (the "Act") as amended, the Administrator of the United States Environmental Protection Agency (U.S. EPA), may require any person who owns or operates any emission source or who is subject to any requirement of the Act to provide information required by the Administrator.

Section 112 of the Act, 42 U.S.C. § 7412, authorizes U.S. EPA to promulgate National Emission Standards for Hazardous Air Pollutants. Standards promulgated under Section 112 of the Act are codified at 40 C.F.R. Part 61,

§ 112(c)(1) of the Act. 40 C.F.R. § 61.05(a)-(c) prohibits any owner or operator from operating any subject stationary source in violation of regulations promulgated under Section 112 of the Act. 40 C.F.R. § 61.05(d) prohibits any owner or operator subject to the standard from failing to report as required by the standard.

Certain asbestos standards promulgated under Section 112 of the Act apply to a demolition or a renovation operation, if there are at least 80 linear meters (260 linear feet) of friable asbestos material on pipes or at least 15 square meters (160 square feet) of friable asbestos material on other facility components (the "cut-off") to be stripped or removed at a facility to be renovated. 40 C.F.R. § 61.145(d). If the amount of friable asbestos material to be removed from either a demolition or renovation operation is above the "cut-off", then the procedures for emission control during removal and waste disposal set forth in 40 C.F.R. §§ 61.147 and 61.152 apply.

The asbestos demolition and renovation standards apply to both the operator of an operation and the owner of a facility to be demolished or renovated. 40 C.F.R. § 61.145. "Owner or operator" means any person who owns, leases, operates, controls, or supervises a stationary source. 40 C.F.R. § 61.102. A facility is any institutional, commercial or industrial structure, installation or building. A facility component includes any pipe, duct, boiler, tank, reactor, turbine, furnace or structural member. 40 C.F.R. § 61.141.

The asbestos demolition and renovation standards include notification requirements. The standard requires that either the operator or owner provide U.S. EPA a written notice of intent to demolish or renovate friable asbestos material. 40 C.F.R. § 61.146(a). Time requirements for this notice are set forth at Section 61.146(b).

The asbestos demolition and renovation standards also require that all notices contain the following information: the name and address of the owner or operator; the size, age, and prior use of the facility; the approximate amount of friable asbestos material present in the facility in terms of linear feet (linear measure) on pipe and in terms of surface area (square measure) on other facility components; location of facility; and scheduled starting and completion dates. In addition, notices for demolitions and renovations above the "cut-off" must contain: nature and method of planned demolition or renovation; asbestos removal emission control procedures; waste handling emission procedures; and, name and location of the waste disposal site where the friable asbestos waste material will be deposited. Notices for demolitions below the "cut-off" must contain the techniques of estimating the amount of friable asbestos material. 40 C.F.R. §§ 61.145(b) and 61.146(c).

The asbestos renovation standard also requires, among other things, the following procedures for asbestos emission control: removing asbestos from the facility prior to wrecking or dismantling; wetting any exposed asbestos material; carefully lowering the asbestos-containing material to the ground; using a local exhaust ventilation and collection system designed and operated to capture particulate asbestos; and, transporting asbestos materials, removed or stripped more than fifty feet above ground level that were not removed in units or sections, in dust-tight chutes or containers. 40 C.F.R. § 61.147.

The asbestos renovation standard also requires the following procedures for disposal of asbestos-containing waste material: wet the asbestos-containing waste; discharge no visible emission to the outside air from collection and wetting operations; seal all asbestos-containing material in leak-tight containers after wetting; label the container

with proper warning labels; and deposit all asbestos-containing material at a waste disposal site, which operates in accordance with 40 C.F.R. § 61.152.

STATEMENT OF FACTS

1. B and W Investment Properties, 134 N. LaSalle Street, Chicago, Illinois is an operator of property located at 1954 S. 54th Avenue, Cicero, Illinois ("Cicero property").

2. The Cicero property consists of several buildings and land in the vicinity of the buildings.

3. On or about August 6, 1990, Mr. Juan J. Vasquez commenced a demolition and/or renovation operation at buildings located at the Cicero property. Mr. Vasquez had been hired by agents of B and W Investment Properties to remove asbestos containing materials from facility components at the Cicero property.

4. On August 28, 1990, inspectors from both the U.S. EPA and the Cook County Department of Environmental Control inspected the Cicero property. The inspectors found that the facility contained more than 260 linear feet of friable asbestos material on pipes and at least 160 square feet of friable asbestos material on other facility components. The inspectors found a large number of bags of asbestos-containing material.

5. The inspectors observed open and damaged bags of dry friable asbestos inside buildings at the Cicero property. The inspectors also found dry friable asbestos on the ground outside of the building. The inspectors observations indicate that the requirements of 40 C.F.R. § 61.152 were violated.

6. The inspectors took samples of suspected asbestos-containing materials. Analysis of these samples indicate the material at the Cicero property contained asbestos.

7. Neither the U.S. EPA nor the Illinois Environmental Protection Agency received the required notification of intent to renovate. Failure to submit the required notification is a violation of 40 C.F.R. § 61.146.

IT IS ORDERED THAT:

8. B and W Investment Properties and its agents shall immediately cease and desist all demolition and/or renovation activities at the Cicero property.

9. Demolition and/or renovation activities shall not resume until and unless all of the following conditions are met:

   a. B and W Investment Properties submit to U.S. EPA, Region V a plan detailing the steps it will take to clean up and dispose of all previously disturbed asbestos, asbestos-containing material and asbestos contaminated material at the Cicero property. The plan shall specify how B and W Investment Properties will comply with the asbestos standards found at 40 C.F.R. Part 61, Subpart M.

   b. B and W Investment Properties shall submit a notification of intent to demolish and/or renovate. The notice must be sent to the parties listed below and must meet the requirements of 40 C.F.R. § 61.146.

      Otto Klein
      Division of Air Pollution Control
      Illinois Environmental Protection Agency
      2200 Churchill Road
      Springfield, Illinois 62794-9276

Rochelle Marceillars
U.S. EPA — 5AC-26-I
230 S. Dearborn
Chicago, Illinois 60604

Robert D. Roache
Cook County Department
of Environmental Control
Maybrook Civic Center
1500 Maybrook Drive
Maywood, Illinois 60153

c. U.S. EPA approval of the plan submitted in response to paragraph 9.a. is required before any work starts at the Cicero property.

10. B and W Investment Properties shall notify U.S. EPA, in advance, of the date when cleanup and disposal is scheduled to begin, on what dates and at what times it shall take place and when it has been completed.

11. B and W Investment Properties shall immediately post warning signs at the Cicero property indicating the presence of asbestos and shall make all reasonable efforts to prevent entry of unauthorized persons into the Cicero property. The warning signs shall be placed at every entry or access point to every building at the Cicero property. B and W Investment Properties shall secure the buildings at the Cicero property to prevent the release of asbestos into the air outside the buildings.

12. For any and all subsequent demolition and renovation operations at any location subject to the standards at 40 C.F.R. § 61.145, B and W Investment Properties shall achieve and maintain compliance with Section 112 of the Act and the standards set forth in 40 C.F.R. § 61.140 *et seq.*

13. This Order in no way affects B and W Investment Properties responsibility to comply with other local, State and Federal laws and regulations, including other applicable provisions of 40 C.F.R. Part 61 and State or County orders to cease work at the Cicero property.

14. Nothing contained in this Order shall be construed to prevent or limit U.S. EPA's right to bring a civil action under Section 113(b) of the Clean Air Act, 42 U.S.C. § 7413(b), to obtain penalties or injunctive relief available under the Act or other Federal statutes, based on past violations of the Act occurring on or before today, or based upon noncompliance with the Order.

15. Nothing in this Order shall be construed to restrict in any way U.S. EPA's authority to request additional information under Section 114 of the Act, 42 U.S.C. § 7414.

16. The plan required to be submitted in paragraph 9.a. and the notifications required by paragraph 10 shall be submitted to:

    Shirley Mitchell, Acting Branch Chief
    Air Compliance Branch
    U.S. EPA — 5AC-26-I
    230 S. Dearborn
    Chicago, Illinois 60604

17. This Order is effective on the date of signature by the Division Director of the Air and Radiation Division.

18. U.S. EPA has elected to issue this Order pursuant to Section 113(a) of the Act in order to prevent further harm to human health and to the environment

through continued emissions of asbestos-containing materials from the Cicero property.

/s/ Shirley A. Mitchell
for David Kee, Director
Air and Radiation Division

Date August 30, 1990

Excerpt from Appellants' Petition for Rehearing with Suggestion for Rehearing in banc filed in the United States Court of Appeals for the Seventh Circuit on November 21, 1994

ARGUMENT

Appellants seek rehearing and hearing in banc by this Court with respect to the issue raised in its appeal providing that under 42 USC 7413(b)(2) the USEPA was required to serve notice upon the appellant prior to the institution of suit. This Court ruled that USEPA has the independent right to bring a direct action absent of that provision pursuant to 42 USC 7412(c). The crux of the argument concerns State Implementation Plans for ambient air quality standards including hazardous air pollutants such as asbestos. 42 USC 7412(d)(1) states:

> "Each state may develop and submit to the administrator a procedure for implementing and enforcing emissions standards for hazardous air pollutants for stationary sources located in such state. If the administrator finds the state procedure is adequate, he shall delegate to such state any authority he has under this chapter to implement and enforce such standards."

Therefore, if the Administrator approves a State Implementation Plan (SIP), then the Administrator has delegated that authority to the state. At that point, the provisions of 42 USC 7413(a)(1) become effective in order to commence an enforcement action and a prerequisite for subject matter jurisdiction for the Trial Court.

This is in fact the case as it exists before this Court. The Illinois legislature had passed a State Statute under Chapter 111½ Section 1009.1, as in effect of the date of this occurrence, that being August of 1990. That Statute superseded prior Statutes in effect and dating back to the

time of USEPA approval of the Illinois SIP Plan. Under Illinois Act, the Pollution Control Board enacts regulations, which include NESHAP regulations. In 35 Illinois Administrative Code Section 201 et seq., the Illinois Pollution Control Board has enacted such regulations. Those regulations were submitted and approved by the Environmental Protection Agency in *45 FR 11493* on February 21, 1980 and *40 CFR Index 52.722*. This enactment took place prior to the dates alleged in the occurrences that are before this Court. Therefore, they were effective at the time of the incident which is now on appeal.

Accordingly, it is the position of the Appellant, that the Court in making its determination of October 24, 1994, clearly failed to recognize that the Federal Government had delegated and relinquished its authority under 112(d)(1). At that point, the State of Illinois had the authority and obligation to enforce, by its own Statute and the approval of USEPA of the SIP. This Court does not recognize the impact that once this delegation has taken place, and thereafter, the enforcement provisions as enumerated in Section 113(a)(1) must be followed. Clearly, 113(a)(1) provides that the Administrator must find that the existence of violations of the applicable State Implementation Plan. And if they exist, then the Administrator may issue an order to comply with such requirement and thereafter bring a civil action. But in either event, notice must be given and the failure to remedy must extend beyond the 30th day after such notice prior to bringing a civil enforcement action. (42 U.S.C. 7413(a)(1)).

The Court in its decision stated that the EPA's authority to pursue violations under 112(c) gave rise to a direct action under 42 USC 7413(b)(3). This is not applicable in the case before the Court because the EPA has delegated and relinquished this authority under 112(d) and there-

after, must give notice under 113(a)(1) that it will assert its authority if the State and violator do not comply within 30 days. To exemplify this proposition, one need only look to the Illinois Statute to see exactly what authority the State has to regulate. Chapter 111½ Section 1009.1(b) provides:

> The provisions of Section 111 of the Federal Clean Air Act (42 USC 7411), as amended relating to standards of performance for new stationary sources, and Section 112 of the Federal Clean Air Act (42 USC 7412) as amended, relating to the establishment of national emissions standards for hazardous air pollutants are applicable to the state and are enforceable under this act.

To go further, Chapter 111½, Section 1009.1(d)(2) prohibits:

> "construct, install, modify or operate any equipment, building, facility, source or installation which is the subject to regulation under Sections 111, 112, 165 or 173 of the Clean Air Act . . ."

So what has occurred is that Illinois has adopted the Federal Statute by the aforestated Statutory provisions. The Federal Government on the other hand, has agreed both through the aforestated Statute (42 USC 7412(d)) and by the Federal Register as previously cited, to delegate enforcement back to the State of Illinois. The Federal Government approved 35 Illinois Administrative Code, Section 201 et seq. as a State Implementation Plan, which includes part 231 Hazardous Air Pollutants enacted same as a Federal Law. In that approval and enactment as Federal Law, the USEPA delegates back to the State of Illinois the right and obligation of enforcement. Although circular, this is the reason that USEPA must give the notice that it will exercise its jurisdiction if the State and the violator do not comply after 30 days. It is for

these reasons, that Appellants contend that the Court's decision with regard to notice is erroneous and for such seek this rehearing.

The Court in its decision recognizes the pre-condition of notice as stated in *United States v. General Motors Corp.*, 876 F.2d 1060, 1063 (1st Cir. 1989) affirmed, 496 U.S. 530; *United States v. Ford Motor Co.*, 736 F.Supp. 1539, 1547 (W.D.Mo. 1990); *United States v. Louisiana Pacific Corp.*, 682 F.Supp. 1122, 1128 (D.Colo. 1987). However, looking at the decision itself, the Court failed to recognize as stated in *United States v. General Motors*, "once an original or revised SIP is approved by the EPA, it becomes Federal Law and is enforceable in one of two ways. Under either method, the first step is for the EPA to issue a notice of non-compliance. If the violator continues and the EPA cannot through negotiations reach some agreement with the polluting source, the agency may enforce the SIP either by issuing an Administrator Order under Section 120 or by instituting an enforcement action under Section 113, which provides for injunctive relief as well as civil penalties of up to $25,000.00 per day . . .". Here, this Court must follow the same construction. There is an approved SIP by EPA which is Federal Law. The commencement of enforcement begins in the same manner. The action for enforcement must commence with either the Administrative Order or the 30 day notice as prescribed by 113(a)(1). Thereafter, and Appellants submit only after said notice, USEPA may bring an enforcement action under 113(b)(2).

This Court has relied upon *Dow Chemical v. United States Environmental Protection Agency*, 635 Fed.Supp. 126 (M.D.La. 1986); *United States v. Hugo Key & Son, Inc.*, 735 Fed.Supp. 1135 (D. R.I. 1989) and *United States v. Tzavah Urban Renewal Corp.*, 696 Fed.Supp. 1013 (D.

N.J. 1988) in standing for the proposition that the US EPA may pursue violations of 112(c) under 113(b)(3) of the Clean Air Act. However, the Court's reliance upon these cases for such proposition is misguided.

In *Dow*, the Court dealt primarily with the questions of subject matter jurisdiction. The request by USEPA to Dow was an informational request under 42 USC 7414 of the Act. Dow brought the action that was before the Court, and said action was not an enforcement action. US EPA never brought an enforcement action on its information request, and to the contrary, a review of that decision reveals that the State of Louisiana thereafter, decided to prosecute Dow. The action brought by Dow sought pre-enforcement review of the validity of an order issued by USEPA against Dow. Obviously, an order was issued and notice was given to Dow seeking information under 114 of the act. This case did not deal with USEPA enforcing a SIP.

Likewise, in *Hugo Key*, the Court once again dealt with the Administrator of EPA requiring information under Section 42 USC 7414(a). A written request under 114(a) was an order to enable the administrator to determine whether or not there were any violations of 112(c). In *Hugo Key*, a written request was made on May 15, 1986, an attempt under 114(a) to make a determination as to whether or not there was any violations of the act. The request was to be complied with within ten (10) days. Hugo Key failed to respond to the reporting requirement. Thereafter, a compliance order was issued by USEPA on June 30, 1986. Hugo Key once again did not respond to the compliance order. The action brought in Hugo Key was an action brought pursuant to 114(a) of the Clean Air Act, not 112(c) of the Clean Air Act. The threshold issue in *Hugo Key* involved enforcement of the reporting re-

quirements under 114 of the Act. The opinion in *Hugo Key* did not deal with the State Implementation Plan, and even if it did, *notice was given.*

Lastly, this Court has relied upon the decision in *United States v. Tzavah Urban Renewal Corp.*, for the proposition that notice is not required. However, as in the previous decisions in *Hugo Key*, notice was in fact given. In *Tzavah*, on December 9, 1987 EPA issued Tzavah a compliance order, index number 70234, mandating compliance with 40 CFR, part 61, subpart M, during all renovations and/or demolition in which friable asbestos is present. Accordingly, at that point, USEPA became involved and gave notice. In July of 1988, more than seven (7) months after the compliance order, the violations continued at the site. It was at that time that another notice was given for compliance within 48 hours, *Tzavah* at 1077. It was after these two notices were sent, that the action was brought for injunctive relief. Clearly, *Tzavah* had notice. Notice was not the issue in the *Tzavah* case but only the time period involved in the notice was contested. The time period that was in fact contested was that period involved in the second, notice, which was 48 hours. This was after a period of non-compliance for seven (7) months after service of the first notice. Lastly, *Tzavah* does not deal with State Implementation Plans for none were alleged or cited.

Appellant in its Reply Brief attached as Exhibit A, the notice given by USEPA. It is once again attached to this Petition for Rehearing. Reading the order in its entirety, one will note that it is in fact an order issued by US EPA intending to exercise its jurisdiction under 42 USC 7414(a)(ii) "determining whether any person is in violation of any such standard or any requirement of such a *Plan.*"

Going to paragraph 14 of that order, the relief to be sought by USEPA is not for penalties and injunctive relief based on this violation, but based upon non-compliance with the order. Therefore, it is apparent that even US EPA in its original order, acknowledges that it only has the right to bring an action based upon non-compliance with the order. Since notice is mandatory, and the order was not served, the Trial Court lacked subject matter jurisdiction. Accordingly, the judgment should have been reversed.

CONCLUSION

The enactment of the Illinois Environmental Protection Act (Title 35 Illinois Administrative Code) by the Federal Government was in fact a State Implementation Plan. Once enacted, the Federal Government delegated to the State of Illinois enforcement provisions subject to its becoming involved in the event of non-compliance. Such involvement is encompassed in 42 USC 7413(a)(1). In order to become involved in State Implementation Plans, the Federal Government must give notice. No notice was served here, thus the jurisdictional subject matter prerequisite was not met. Appellants seek such a finding a reversal on rehearing.

Respectfully submitted,

/s/ Robert A. Egan

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Supreme Court, U.S.
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No. 94-1431

In the Supreme Court of the United States

OCTOBER TERM, 1994

B & W INVESTMENT PROPERTIES AND LOUIS WOLF,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether pre-suit notification was required before the United States initiated civil enforcement actions against petitioners under the Clean Air Act, 42 U.S.C. 7413(b)(3) and (4) (1988), for violations of the Act's hazardous air pollutant requirements, 42 U.S.C. 7412(c), and the Act's recordkeeping and reporting requirements, 42 U.S.C. 7414.

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In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-1431

B & W INVESTMENT PROPERTIES AND LOUIS WOLF, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-12), as modified (Pet. App. 14-15), is reported at 38 F.3d 362.

JURISDICTION

The judgment of the court of appeals was entered on October 24, 1994. A petition for rehearing was denied on December 2, 1994 (Pet. App. 14-15). The petition for a writ of certiorari was filed on Febru-

ary 27, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Clean Air Act authorizes the Administrator of the Environmental Protection Agency (Administrator) to publish a list of hazardous air pollutants that "cause[], or contribute[] to, air pollution which may reasonably be anticipated to result in an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness." 42 U.S.C. 7412(a)(1) and (b).[1] The Administrator is also required to prescribe national emission standards for such hazardous air pollutants (NESHAP), which must be set at a level that provides an ample margin of safety to protect the public health. 42 U.S.C. 7412 (b)(1)(B). When it is not feasible to prescribe or enforce emission standards, the Administrator may promulgate work practice standards prescribing specific procedures for handling hazardous air pollutants. 42 U.S.C. 7412(e)(1).

In 1971, the Administrator designated asbestos as a hazardous air pollutant pursuant to Section 7412. 36 Fed. Reg. 5931. A major source of airborne asbestos is demolition and renovation activities where insulation containing asbestos is stripped or removed from structures and pipes. The Administrator first issued an asbestos NESHAP in 1973. 38 Fed. Reg.

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[1] The Clean Air Act was amended in November 1990. See Pub. L. No. 101-549, 104 Stat. 2399. The events at issue occurred prior to that date. Therefore, the district court and the court of appeals applied pre-amendment law, except for a post-amendment provision that mitigated punishment. Pet. App. 1 n.1. Unless otherwise noted, all references to the Act in this brief are to the Act before the 1990 amendments.

8820. It regulates emissions of airborne asbestos by establishing work practice standards for handling and disposing of asbestos during asbestos stripping and removal activities. The Environmental Protection Agency (EPA) has authorized the State of Illinois to implement and enforce the asbestos NESHAP pursuant to 42 U.S.C. 7412(d)(1), while retaining authority to bring an action itself for any NESHAP violation under 42 U.S.C. 7412(d)(2). The 1984 version of the asbestos NESHAP (49 Fed. Reg. 13,658) applies to the renovation activities in this case, and is published at 40 C.F.R. Pt. 61, Subpt. M, Sections 61.140-61.156 (1989).[2]

The asbestos NESHAP requires owners and operators[3] of renovation projects to follow specific "work

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[2] The asbestos NESHAP defines "renovation" in relevant part as "altering in any way one or more facility components" (40 C.F.R. 61.141 (1989)); "facility component" as "any pipe, duct, boiler, tank, reactor, turbine, or furnace at or in a facility; or any structural member of a facility" (*ibid.*); and "facility" as "any institutional, commercial, or industrial structure, installation, or building (excluding apartment buildings having no more than four dwelling units)" (*ibid.*). The asbestos NESHAP was revised and repromulgated in November 1990 (55 Fed. Reg. 48,406).

[3] An "owner or operator" is defined in the general NESHAP regulations to include "any person who owns, leases, operates, controls, or supervises a stationary source." 40 C.F.R. 61.02 (1989). The Act defines "stationary source" as "any building, structure, facility, or installation which emits or may emit any air pollutant." 42 U.S.C. 7411(a)(3). The general provisions of the NESHAP regulations further define "stationary source" as "any building, structure, facility or installation which emits or may emit any air pollutant which has been designated as hazardous by the Administrator." 40 C.F.R. 61.02 (1989).

practice standards" when a renovation operation involves stripping or removing at least 260 linear feet of friable asbestos materials from pipes, or at least 160 square feet of friable asbestos materials from other facility components. 40 C.F.R. 61.145(d), 61.147, 61.152 (1989).[4] The standards require that friable asbestos materials be sufficiently wet when they are being stripped from facility components, unless EPA waives this requirement (40 C.F.R. 61.147 (c) (1989)), and that friable asbestos materials that have been removed or stripped must be sufficiently wet and remain wet until they are collected for disposal. 40 C.F.R. 61.147(e) (1989).

Emitting an air pollutant in violation of a NESHAP by a stationary source is a violation of 42 U.S.C. 7412(c). The Administrator is authorized to commence a civil action seeking injunctive relief, or a civil penalty "of not more than $25,000 per day of violation, or both, whenever such person * * * violates * * * section 7412(c)." 42 U.S.C. 7413(b)(3).

The Administrator is authorized by 42 U.S.C. 7414 (a) to establish reporting requirements applicable to owners and operators of emission sources subject to various requirements promulgated under Section 7412, including the asbestos NESHAP, to enable EPA to determine whether an owner or operator has violated Section 7412. Accordingly, the asbestos NESHAP requires each owner and operator of a renovation operation to provide EPA with timely, advance written notice of the intention to renovate a facility. 40 C.F.R. 61.145, 61.146(b)(4) (1989).

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[4] "Friable asbestos material" is defined as "any material containing more than 1 percent asbestos by weight that hand pressure can crumble, pulverize, or reduce to powder when dry." 40 C.F.R. 61.141 (1989).

When a renovation operation involves stripping or removing at least 260 linear feet of friable asbestos materials from pipes, or at least 160 square feet of friable asbestos materials from other facility components, written notice regarding the renovation must be given as early as possible before renovation begins. 40 C.F.R. 61.145, 61.146(b)(4), 61.146(c) (1989). The Administrator is authorized to commence a civil action seeking injunctive relief, or a civil penalty "of not more than $25,000 per day of violation, or both, whenever such person * * * fails or refuses to comply with any requirement of section 7414." 42 U.S.C. 7413(b)(4).

The Clean Air Act also provides for the Administrator to establish national primary and secondary ambient air quality standards. 42 U.S.C. 7409. States are required to adopt, and to submit for EPA approval, a state implementation plan. 42 U.S.C. 7410. An implementation plan must provide for the implementation, maintenance, and enforcement of the national primary and secondary air quality standards promulgated by the Administrator. The enforcement procedures for violations of "any requirement of an applicable implementation plan," 42 U.S.C. 7413(a)(1) and (b)(2)—*i.e.*, any requirement of a state implementation plan for national primary and secondary ambient air quality standards, see 42 U.S.C. 7410(d)—differ from the procedures in Section 7413(b)(2) for violations of Sections 7412 and 7414. Under Section 7413(a)(1), the Administrator is required to notify a person found to be in violation of "an applicable implementation plan," and if the violation extends beyond the 30th day after the date of notification, the Administrator may act to enforce the finding either by issuing an administrative order

requiring compliance or by initiating a civil action under Section 7413(b)(2).[5]

2. In 1989, petitioner Louis Wolf purchased approximately 5.5 acres of property in Cicero, Illinois, that includes four buildings. Pet. App. 3. In May 1990, the undeveloped portion of the property was leased by Wolf's colleague Albert Berland, as an agent for petitioner B & W Investment Properties, Inc. (B & W), to David Moss for use as a storage lot. *Ibid.* Berland entered into an agreement to sell Moss the property, subject to removal of asbestos from the buildings, after which Berland hired a contractor to remove the asbestos. *Id.* at 3-4.

EPA was not given notice of this renovation work prior to the contractor's initiation of the work on August 10, 1990. Pet. App. 4. EPA investigators went to the site on August 27 and 31, 1990, following receipt of an anonymous tip concerning the renovation activities at the site. The investigators discovered at the site large quantities of unwetted friable asbestos which was capable of becoming airborne near the adjacent commuter rail stop. They also noted a general lack of security at the site including open doors, broken windows, a hole in the roof, and the absence of warning signs to alert individuals to the danger of asbestos exposure. *Ibid.*

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[5] The 1990 amendments to the Clean Air Act incorporated the amended provisions governing procedures for violations of an applicable implementation plan, previously found in subsections (b)(1) and (b)(2), in a new subsection (b)(1). See 42 U.S.C. 7413(b)(1) (Supp. V 1993). The 1990 Act incorporated the amended provision governing civil enforcement actions for violations of Sections 7412 and 7414, previously found in subsection (b)(3), in a new subsection (b)(2). See 42 U.S.C. 7413(b)(2) (Supp. V 1993).

On August 30, 1990, EPA served Berland with an administrative order which outlined the inspectors' findings, required cessation of the renovation activities, and stated the steps required to bring the property into compliance with the relevant laws. Pet. App. 27-34. Wolf, as agent for B & W, subsequently hired a contractor to perform the necessary cleanup work, which commenced on January 21, 1991 and was completed March 13-15, 1991. *Id.* at 4.

3. On September 16, 1991, the United States initiated a civil enforcement action against Louis Wolf and B & W alleging violations of the Clean Air Act, specifically Sections 7412 and 7414, and the asbestos NESHAP, and seeking civil penalties against each defendant and permanent injunctive relief. Pet. App. 16-25. The district court granted the government's motion for summary judgment, concluding that Wolf and B & W were jointly and severally liable under the Act and regulations for the violations. The court accepted a magistrate judge's penalty recommendation and reduced Wolf's liability based on his ability to pay, and assessed no fine for the violation of Section 7414. Pet. App. 5.

4. The court of appeals affirmed. Pet. App. 1-12. The court held that Section 7413(b) did not require the United States to give notice before initiating its asbestos NESHAP enforcement action because presuit notification is required only in actions to enforce state implementation plans under the Act and is not required in actions to enforce Section 7412(c) (NESHAP violations) or Section 7414 (notice violations). Pet. App. 5-8. The court also ruled that the district court did not err in finding B & W liable as an "owner or operator" of the subject property, and did not abuse its discretion regarding the penalty im-

posed or in rejecting defendants' effort to admit as evidence an internal EPA memorandum. *Id.* at 8-12. The court denied Wolf's and B & W's petition for rehearing with suggestion for rehearing en banc, and amended a portion of one sentence in its opinion. *Id.* at 14-15.

ARGUMENT

Petitioners assert (Pet. 9-13) that the court of appeals erred in affirming the district court's determination that the United States was not obligated under 42 U.S.C. 7413(b)(2) to serve Wolf and B & W with a notice of the Section 7412(c) NESHAP violation and the Section 7414 reporting violation in advance of instituting this civil enforcement action for those violations. Petitioners contend (Pet. 10) that this case involves alleged violations of a state implementation plan, because "the Administrator had delegated to the State of Illinois his authority to implement and enforce both asbestos removal [42 U.S.C. sec. 112(d)(1) [*sic*]] and asbestos reporting requirements [42 U.S.C. sec. 114(b)(1) [*sic*]]." Accordingly, in petitioners' view, this civil enforcement action was unlawful because Wolf and B & W received no pre-suit notice as required by Section 7413(b)(2) prior to initiation of a civil action for violations of a state implementation plan, which then may proceed only "if there is a compliance failure 30 days after the date of notice to that person." Pet. 10.

Petitioners' contentions are not supported by any appellate decision and are contradicted by the terms of the Act. The Act provides that the pre-suit notification requirements apply only to claims of violations of "any requirement of an applicable implementation plan." 42 U.S.C. 7413(a)(1) and (b)(2).

Petitioners err by assuming (Pet. 10) that the term "applicable implementation plan" includes the authority delegated to the State of Illinois under Section 7412(d) to enforce Section 7412 NESHAP violations, and under Section 7414(b) to carry out the reporting requirements of Section 7414.

Contrary to petitioners' assumption, the Act's definition of the term "applicable implementation plan" does not include state procedures developed and submitted to the Administrator under Section 7412 (d)(1) "for implementing and enforcing emission standards for hazardous air pollutants for stationary sources located in such State," or state procedures developed and submitted to the Administrator under Section 7414(b)(1) "for carrying out" Section 7414's requirements in the State. Rather, Section 7410(d) expressly limits the use of the term "applicable implementation plan" to a state implementation plan for national primary and secondary ambient air quality standards approved or promulgated under Section 7410:

> For purposes of this chapter, an applicable implementation plan is the implementation plan, or most recent revision thereof, which has been approved under subsection (a) of this section or promulgated under subsection (c) of this section and which implements the requirements of this section.

42 U.S.C. 7410(d).

Accordingly, the notification requirements in Section 7413(a)(1) and (b)(2) have no application here. This case involves enforcement of Sections 7412(c) and 7414, and does not involve enforcement of "an applicable implementation plan," as Congress

defined that term "[f]or purposes of" the Clean Air Act. As explained above, Section 7413(b)(3) provides for the initiation of a civil enforcement action for violations of Section 7412(c), and Section 7413 (b)(4) provides for the initiation of a civil enforcement action for violations of Section 7414. Neither subsection (b)(3) nor (b)(4) contains any pre-suit notification requirement.

In these circumstances, the court of appeals correctly held that "the Act imposes no duty on the EPA to provide notice of violations of section [7412] before commencing an action for injunction or civil penalties." Pet. App. 6. As the court explained,

> [T]he EPA did not rely on the enforcement provision of section 113(b)(2) [7413(b)(2)]. In fact the EPA could not, because section 113(b)(2) which concerns violations of state implementation plans for ambient air quality standards, by its terms does not apply to regulation of hazardous air pollutants. There are no ambient air quality standards for hazardous air pollutants such as asbestos. 42 U.S.C. § 7412 (" 'hazardous air pollutant' means an air pollutant to which no ambient air quality standard is applicable").

Ibid.

Nor, finally, are petitioners correct in suggesting (Pet. 10) that the Administrator had no authority to initiate enforcement actions for violations of Section 7412(c) or Section 7414, because he had delegated to the State authority to enforce the Section 7412 asbestos NESHAP and authority to carry out Section 7414. Subsection (d)(1) of Section 7412 provides for delegation of the Administrator's enforcement authority to a State that meets the provision's condi-

tions for such delegation, but subsection (d)(2) expressly reserves concurrent enforcement authority in the Administrator:

> Nothing in this subsection shall prohibit the Administrator from enforcing any applicable emission standard under this section.

42 U.S.C. 7412(d)(2). Similarly, subsection (b)(1) of Section 7414 permits delegation of the Administrator's authority to "carry out" Section 7414 to a State that meets the provision's conditions for such delegation, but subsection (b)(2) expressly reserves concurrent authority in the Administrator to carry out this authority in the State:

> Nothing in this subsection shall prohibit the Administrator from carrying out this section in a State.

42 U.S.C. 7414(b)(2).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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